BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

HENRY F. COCKERHAM Claimant VS.	)	
	)	Docket No. 201,867
NICHOLS FLUID SERVICE Respondent AND	)	
WAUSAU UNDERWRITERS INSURANCE COMPANY Insurance Carrier	)	

ORDER

Claimant appeals from a preliminary Order entered by Special Administrative Law Judge Leroy C. Rose on November 7, 1995.

ISSUES

The Special Administrative Law Judge denied claimant's request for preliminary benefits including payment of medical expenses, temporary total disability compensation and temporary partial disability compensation. The Special Administrative Law Judge found that the claimant had settled this claim as a part of a lump sum redemption in Docket No. 184,315. The claimant appeals that finding, raising the following issues:

(1) Whether a denial of medical and temporary total disability compensation based on the defense of accord and satisfaction is a jurisdictional question providing the Appeals Board with jurisdiction as provided by K.S.A. 44-534a(a)(2); and
(2) Whether the settlement in Docket No. 184,315 constituted a settlement of the subject claim herein, based upon several alleged contractual and procedural defects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for purpose of preliminary hearing, the Appeals Board finds as follows:

It was the contention of the respondent and insurance carrier at the October 18, 1995 preliminary hearing in Docket No. 201,867, which is the subject of this appeal, that the claimant settled this claim as a part of the settlement in Docket No. 184,315.

Claimant's counsel responded that it was claimant's intent in Docket No. 184,315 to settle only his claim arising out of the accident of February 21, 1991, and not the April 14, 1995 accident which is the subject of this claim in Docket No. 201,867. Both claims involved the same employer but different insurance carriers. Hence, claimant argues that the two docketed claims do not involve the same parties. In addition, claimant accepted payment in Docket No. 184,315 from Mid Continent Casualty Company, who was respondent's insurance carrier at the time of the February 21, 1991 accident. Claimant argues that since this docketed claim involves Wausau Insurance Company, there was no consideration from Wausau to settle this claim. Claimant further contends that there was otherwise no consideration paid for settlement of this claim and, therefore, the settlement in Docket No. 184,315 should not bar claimant from proceeding with his claim for benefits in Docket No. 201,867. Claimant's counsel further points out that at the time of the settlement in Docket No. 184,315, a claim for the accident of April 14, 1995 had not been filed, was not of record and no docket number was assigned and, therefore, the claim could not be settled as it had not been commenced. In addition, claimant's counsel asserts that claimant's intent was to settle only his claim for the accident of February 21, 1991 and notes that the settlement award in that case was not signed by the Special Administrative Law Judge and, therefore, should be given no effect. The Special Administrative Law Judge rejected each of claimant's arguments and denied preliminary hearing benefits finding the settlement to be binding on the parties.

On May 8, 1995, the claimant settled his workers compensation claim against the respondent in Docket No. 184,315 pursuant to K.A.R. 51-3-1(d). The terms of the settlement were announced to the court as follows:

> "MS. MCQUEEN: Respondent and insurance carrier admit the claimant suffered a compensable industrial accident during his employment, but deny the nature and extent of any objective permanent partial disability as a result thereof. The respondent and insurance carrier agree to pay the claimant the lump sum of $30,000 over and above all temporary total disability and medical benefits previously paid for his industrial accident of February 21, 1991, and any and all other industrial accidents arising out of and in the course of claimant's employment with the respondent up to the date of this hearing. The claimant agrees to waive trial, any claims for past temporary total disability benefits, past or future medical benefits, vocational rehabilitation assessment/evaluation/ training and remedies under KSA 44-528. This settlement represents an approximate 19 percent permanent partial disability to the body as a whole, and is intended to be a redemption of liability pursuant to KSA 44-531.
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> "MR. GREENLEAF: That's our understanding of the settlement and it's agreeable." (Transcript of May 8, 1995 Settlement Hearing; Respondent's Exhibit 2 to the October 18, 1995 Preliminary Hearing transcript.)

The Appeals Board has jurisdiction to review this appeal from a preliminary hearing order. The Order dated November 7, 1995, from which claimant appeals, deals solely with

the issue of claimant's entitlement to preliminary benefits. K.S.A. 1995 Supp. 44-551(b)(2)(A), states in pertinent part:

> "If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing."

K.S.A. 44-534a(a)(2) clearly grants authority to the Administrative Law Judge to make a preliminary award concerning issues of medical treatment and temporary disability compensation. That statute further makes provision for the jurisdiction of the Appeals Board to review preliminary hearing orders whereby:

> "A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board."

Respondent contends that the claimant's application for preliminary benefits must be denied based upon the settlement. In so doing respondent raises the defense of accord and satisfaction. Claimant therefore contends that an allegation that claimant settled his claim constitutes a certain defense under K.S.A. 44-534a(a)(2) such that the preliminary Order entered by the Special Administrative Law Judge is subject to review by the Appeals Board.

The question of the Appeals Board's jurisdiction to review this Order turns upon what is meant by a "certain defense." Unfortunately, the statute provides little guidance. The Appeals Board does not find that there exists a category of defenses to workers compensation claims known as "certain defenses." Rather, the phrase "certain defenses" is analogous to *some* defenses as opposed to *any* defenses or *all* defenses. The word "certain" as used in K.S.A. 44-534a is intended to limit the type and character of defenses which can be said to give rise to Appeals Board jurisdiction. For insight into the certain type of defenses contemplated by the statute, we must look to the other issues specified in K.S.A. 44-534a which, if disputed, are considered jurisdictional. They include: (1) whether the employee suffered an accidental injury; (2) whether the injury arose out of and in the course of the employee's employment; and (3) whether notice is given or claim timely made. What these jurisdictional issues have in common is that they all go to the compensability of the claim. In other words, for a workers compensation claim to be compensable each and every one of the issues listed, if disputed, must be proved by a claimant before he or she can recover any benefits under the Workers Compensation Act. The Appeals Board has previously held that the certain type of defenses contemplated by K.S.A. 44-534a(a)2 are defenses which go to the compensability of the claim. The Appeals Board has in the past cited as examples of these type of defenses an allegation of a willful failure to use a guard or the intoxication defense. (See e.g. Sexton v. Barrett Cement Company, Docket No. 193,688, opinion filed November 21, 1995.) In the case of McRoy v. City of Olathe, Docket No. 199,048, opinion filed July 31, 1995, the Appeals Board held that a denial of preliminary benefits based upon a finding that claimant's failure to use a seat belt could be the basis for Appeals Board review of the preliminary Order pursuant to K.S.A. 44-534a(a)(2). Thus a defense, pursuant to K.S.A. 44-501(d)(1)

alleging a willful failure to use a guard against an accident voluntarily provided by the employer, would constitute one of the certain types of defenses contemplated by K.S.A. 44-534a(a)(2) as jurisdictional and subject to review by the Appeals Board.

The defense of accord and satisfaction raised by the respondent herein, if successful, would result in the denial or termination of compensation beyond the date of the settlement. Thus, under the facts of this case, the defense of accord and satisfaction, if successful, would not result in a finding that the claim is not compensable but rather would result in a denial of additional benefits. Even with such a finding a claimant is still entitled to benefits previously provided that pre-date the applicability of the defense, i.e. the date of the settlement. The respondent would not be entitled, for example, to reimbursement from the Workers Compensation Fund for medical or temporary total disability benefits previously provided under K.S.A. 44-534a(b) under circumstances where benefits are cut off and the award redeemed pursuant to K.A.R. 51-3-1(d). Furthermore, the finding of accord and satisfaction is an interlocutory order which can be altered or rescinded upon additional evidence or otherwise upon a final hearing. As stated previously, such a finding does not go to the ultimate question of the compensability of the claim, but instead to the issue of claimant's entitlement to ongoing or future benefits. These examples all support a finding that, unlike the defense's alleging intoxication or a willful failure to use a guard, the defense of accord and satisfaction does not constitute a defense which should be considered jurisdictional and subject to review by the Appeals Board on an appeal from a preliminary order.

The Appeals Board concludes that the arguments made in this appeal do not, in the present procedural posture, raise an issue which is subject to review under the limited review jurisdiction granted the Appeals Board on appeals from preliminary hearing orders. The Special Administrative Law Judge's Order of November 7, 1995 is not a final order. He has not entered a final ruling on the claimant's claim, instead, he has only denied preliminary hearing benefits. The arguments by claimant do not relate to an issue listed in K.S.A. 44-534a or otherwise allege that the Special Administrative Law Judge exceeded his jurisdiction. Therefore, the Appeals Board does not have jurisdiction to review the Order at this juncture of the proceedings. The claimant's Application for Review should, therefore, be dismissed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the claimant's Application for Review should be, and is hereby, dismissed and the November 7, 1995 Order of Special Administrative Law Judge Leroy C. Rose remains in full force and effect.

IT IS SO ORDERED.

Dated this ____ day of February 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Steve Brooks, Liberal, KS
Kerry E. McQueen, Liberal, KS
Leroy C. Rose, Special Administrative Law Judge
Philip S. Harness, Director